IN THE

upreme Court of the United States

OCTOBER TERM, 1954

No. 43

E TEE-HIT-TON INDIANS, an identifiable group of Alaska Indians, *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

BRIEF FOR THE PETITIONER

JAMES CRAIG PEACOCK,
Counsel for Petitioner,
817 Munsey Building,
Washington 4, D. C.

N W. MEYER,
AM L. PAUL, JR.,
RICK PAUL,
E. SKILLING,
H. MYERS,
Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Court of Claims is reported at 120 F. Supp. 202, but is not yet reported in the official reports.

JURISDICTION

The judgment below dismissing plaintiff's [petitioner's] petition was entered April 13, 1954 (R. 33). The jurisdiction of this Court was invoked under 28 U.S.C. Secs. 1255(1) and 2101(e) by petition for certiorari filed April 19, 1954, and granted June 7, 1954.

STATUTES AND TREATY INVOLVED

This case arises under the following Joint Resolution (commonly referred to as the Act) of August 8, 1947, 61 Stat. 920—

JOINT RESOLUTION

To authorize the Secretary of Agriculture to sell timber within the Tongass National Forest.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That "possessory rights" as used in this resolution shall mean all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes, native villages, native individuals, or other persons, and which have not been confirmed by patent or court decision or included within any reservation.

SEC. 2. (a) The Secretary of Agriculture, in contracts for the sale, or in the sale, of national forest timber under the provisions of the Act of June 4, 1897 (30 Stat. 11, 35), as amended, is authorized to include timber growing on any vacant, unappropriated, and unpatented lands within the exterior boundaries of the Tongass National Forest in Alaska, notwithstanding any claim of possessory rights. All such contracts and sales heretofore made are hereby validated.

(b) The Secretary of the Interior is authorized to appraise and sell such vacant, unappropriated, and unpatented lands, notwithstanding any claim of possessory rights, within the exterior boundaries of the Tongass National Forest as, in the opinion of the Secretary of the Interior and the Secretary of Agriculture, are reasonably necessary in connection with or for the processing of timber from lands within such national forest, and upon such terms and conditions as they may impose.

(c) The purchaser shall have and exercise his rights under any patent issued or contract to sell or sale

made under this section free and clear of all claims based upon possessory rights.

SEC. 3. (a) All receipts from the sale of timber or from the sale of lands under section 2 of this resolution shall be maintained in a special account in the Treasury until the rights to the land and timber are finally determined.

(b) Nothing in this resolution shall be construed as recognizing or denying the validity of any claims of possessory rights to lands or timber within the exterior boundaries of the Tongass National Forest.

Approved August 8, 1947.

Those portions of the Acts of May 17, 1884, 23 Stat. 24, and June 6, 1900, 31 Stat. 321, 330, which are also involved have been printed in the opinion below at R. 23, and are again printed in Point III of this brief at pages 42-43, *infra*.

Petitioner does not consider the text of any portion of the 1867 Treaty of Cession between Russia and the United States as involved in this case, but in case the Court desires to refer to it the text of the entire treaty as reported at 15 Stat. 539 will be found in the Appendix at page 64, *infra*.

QUESTIONS PRESENTED

In general terms the outstanding question is one of first impression in this Court as to the extent to which aboriginal *Tlingit* Indian ownership of land has survived in southeastern Alaska.

More specifically that large question can be broken down in any of several ways. One is that presented by the issues posed in the February 1953, order of the court below (R. 7, and page 5, *infra*). In the light of that court's opinion, however, some rearrangement of that breakdown may be helpful at this stage of the case: Did petitioner's aboriginal full proprietary ownership continue unimpaired under Russian sovereignty? What was the effect, if any,

of the 1867 Treaty of Cession upon petitioner's then interest, whatever may have been its nature or extent? What was the effect of the subsequent Acts of May 17, 1884, March 3, 1891, and June 6, 1900? What has been the effect, if any, of petitioner's admittedly less intensive user of its area since the turn of the century? And, if petitioner's position on those questions is not sustained, then there is a new question injected into the case for the first time by the court below as to the extent to which so-called original Indian title is a right on which a suit against the United States may be based.

There is also a related question as to whether execution of a timber sales agreement such as that of August 20, 1951 (R. 31), constitutes a compensable taking of petitioner's interest whatever its nature.

STATEMENT OF THE CASE

This is a suit by the petitioner Tee-hit-ton Indians, a "clan" of *Tlingit* Indians of Alaska. Its members are descendants of the earliest known native owners of an island in southeastern Alaska near its winter village at Wrangell. It claims that a compensable interest in land belonging to it was taken when the respondent United States, on August 20, 1951, executed a Timber Sales Agreement with a pulp and paper company for all merchantable timber on a specified portion of that land. The Government's action was taken under the authority of and in apparent accordance with the terms of the Act of August 8, 1947, 61 Stat. 920, the full text of which is set out in the opinion below at R. 23-24, and again printed at page 2, *supra*. R. 16-17, 26-32.

The judgment below arose out of the separate trial of a limited number of specified issues. In pursuance of its Rule 38(b) the Court of Claims had ordered such a trial of six technical issues of law (and related issues of fact) the decision of which might make unnecessary the taking of voluminous evidence as to use, occupation, and value of large and remote areas in Alaska (R. 6-8).

The first issue was occasioned by the Government's challenge to the petitioner's capacity to sue. Petitioner's right to maintain this suit was sustained, and that issue is not before this Court. The five remaining issues were—

> "2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?
>
> "3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?
>
> "4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?
>
> "5. In the event a decision of an affirmative nature on any of issues 2, 3, or 4, is followed by evidence indicating specific property rights on the part of plaintiff at any of those times, then would the testimony of plaintiff's witness Paul as to recent less intensive use of the areas claimed by plaintiff (Tr. 13-14, 29-30, 44-45, 96-97) constitute prima facie evidence of termination or loss of such rights?
>
> "6. If any such property rights are established, and had not meanwhile been terminated or lost, then would the execution of the Timber Sale Agreement of August 20, 1951, (as admitted in paragraph 10 of defendant's Answer) constitute a compensable taking of such rights, or would it give rise to a right to an accounting within the jurisdiction of this Court, or both?"

All five issues had to do with the merits, and the judgment dismissing the petition follows the court's opinion on those issues as summarized in its "Conclusion of Law" at R. 32—

> "that, the court being of the opinion that the plaintiff's interest in the lands prior to the treaty of 1867 was original Indian title, which, if it survived the cession of 1867, would not be a right on which a suit against the United States could be based, does not answer the question posed in issue 2; that no property rights in the land in question enforceable by suit against the United States inured to the plaintiff by reason of the statutes cited in issues 3 and 4; that issues 5 and 6, as stated, do not call for answers, in view of the court's answers to the other questions."

Issue 2 is considered *in extenso* in Points I and II of this brief at pages 14 and 29, *infra*. Issues 3 and 4 are similarly developed in Point III at page 41, *infra*, as are issue 5 in Point IV at page 47, *infra*, and issue 6 in Point V at page 51, *infra*, respectively.

This case is definitely one of first impression, presenting as it does several basic questions of law as to the nature and extent of *Tlingit* Indian title *in Alaska* none of which have ever been authoritatively decided. The gist of petitioner's case is that there are two major considerations which necessarily lead to an end result very different from the familiar stateside concept of "original Indian title". One is the fundamentally different historical, political, and legal background of Russian America. The other is the provisions of several Acts of Congress which apply only to Alaska and have never had any stateside counterparts.

SUMMARY OF ARGUMENT

As a preliminary to the several Points of our Argument it is shown in detail on pages 8-14, *infra*, that this case presents none of the all too familiar "difficulties" which are so commonly encountered in Indian cases and which are so comprehensively enumerated in a concurring opinion in *Shoshone Indians v. United States*, 324 U.S. 335, 354. For example, the Government's own evidence establishes that these Indians have always had a well defined system of property ownership not unlike our own, and that under

a complex legal system title to land was recorded through elaborate ceremonials and in carvings on the famous totem poles. And so on. We submit that because of these and similar considerations which are developed more fully on those pages the instant case is entitled to consideration solely and strictly on its own legal merits as a law suit.

The gist of our argument is that there are two major considerations which necessarily lead to an end result in *Tlingit* Alaska very different from the familiar stateside concept of "original Indian title" (which the court below erroneously held to have obtained in what is now that great Territory).

One is that the historical, political, and legal background of Russian America was so fundamentally different from that of the forty-eight states of continental United States that *Tlingit* aboriginal full proprietary ownership such as that of this petitioner continued unimpaired throughout the entire period of Russian sovereignty. In particular it appears that Russia never reached Alaska until long after that great age of Sixteenth Century exploration and discovery which Chief Justice Marshall marked as the historical starting point of the stateside concept of so-called "original Indian title"; that when Russia did reach Alaska it did not interfere with native ownership—at least not in the *Tlingit* section of southeastern Alaska in which alone we are presently interested; and in a word that there was nothing in the *Tlingit* picture which fits in with or "qualifies" under "original Indian title" as that concept has been developed in the long line of cases which stem from *Johnson* v. *McIntosh*, 8 Wheat. 543. See Point I at page 14, *infra*. A corollary to this branch of the case is that the continuance of petitioner's unimpaired full proprietary ownership was in no wise affected by the 1867 treaty of cession. See Point II at page 29, *infra*.

The other principal consideration is that two Acts of Congress passed in 1884 and 1900, which apply only to Alaska and have no stateside counterparts, at one and the

same time recognized rights stemming as in petitioner's case from aboriginal ownership, and also independently created a new and co-existing right of full proprietary ownership. See Point III at page 41, *infra*.

Because of changing social and economic conditions petitioner's user of its area has admittedly been less intensive since the turn of the century, but it is shown that the law is well established that such facts do not constitute even *prima facie* evidence of any termination of petitioner's interest, whatever may have been its nature. See Point IV at page 47, *infra*.

The argument then turns to a different aspect of the case in response to the defense pleaded in respondent's answer that a cause of action has not yet accrued. It is shown on the contrary that the cases sustain our position that appropriation of timber rights implicit in the execution of the Timber Sales Agreement by respondent's agents on August 20, 1951, constituted as of that date a partial and compensable taking of plaintiff's interest, whatever may have been its nature. See Point V at page 51, *infra*.

And finally, even if it be assumed for the sake of argument that "original Indian title" ever obtained in Alaska it is shown that the court below erred further in the legal consequences which it attributed thereto, and particularly so in the undue emphasis which it sought to place on a distinction between recognized and unrecognized title of that sort. See Point VI at page 57, *infra*.

ARGUMENT

Preliminary considerations.

This case presents none of the familiar "difficulties" which so often underlie any effort to settle an Indian grievance through the medium of a law suit and which were so comprehensively enumerated in a concurring opinion of two Justices in *Shoshone Indians* v. *United States*, 324 U. S. 335, 354. We deem it not amiss there-

fore at the very outset of our argument to stop and point out how fundamentally different in every material respect are the corresponding circumstances in the instant case.

We start with the actual findings below. *Tlingit* and Haida are the names of two native languages of southeastern Alaska and are also commonly used as generic terms descriptive of the Indians speaking those respective languages (R. 26). The present petitioner is a clan of such *Tlingit* Indians (R. 27). It may also be noted that Congress has recognized the *Tlingit* and Haida Indians as those residing "in the region known and described as southeastern Alaska, lying east of the one hundred and forty first meridian" (49 Stat. 388), i.e., east of Mount St. Elias. Our case is bottomed on considerations which have to do solely with *Tlingit* Alaska (or in other words with only a part of what is commonly referred to as the narrow southeastern "panhandle"), and do not concern the vast reaches of those hundreds of thousands of square miles aboriginally inhabited, if at all, by non-Indian Aleuts and Eskimos. Cf. Plaintiff's Exhibit No. 3, Tr. 34-35.*

With these premises in mind let us turn to the *Shoshone* case, supra, typical as it was of so many Indian cases dealing with the rights of "extremely primitive men" who "did not know what land titles were", "had no sense of property in land", and "had no system or standard of exchange". *But this is no such case.* That the *Tlingit* Indians now before this Court may well be proud of an ancestral culture and civilization more nearly comparable with that of the Aztecs of Mexico and the Incas of Peru is amply established in the record of this case, and particularly by an official Government report already in evidence as *Defendant's* Exhibit 6 (R. 9), from page iv of which we quote briefly—

* For convenient examination by this Court, if it so desires, all the evidence below (Transcript pages 1-99, Plaintiff's Exhibits Nos. 1-12, and Defendant's Exhibits Nos. 1-6) has been certified to and lodged with the Clerk of this Court, and will from time to time be referred to throughout this brief.

"The **Tlingit** and Haida Indians have continuously used and occupied the lands and waters of Southeastern Alaska since before the first exploration in the area. They used all the bays, inlets, islands, and streams from a little south of the mouth of the Copper River to the southern tip of Alaska. Without knowledge of writing, hard metals or machinery, they **developed one of the highest forms of civilization in aboriginal America north of Mexico. It was** rich in ceremony and creative arts, and **complex in its social, legal and political systems.**

* * * * *

"The Tlingit and Haida utilized all the major resources in the area, except gold, which was of no value to them. The native economy utilized the teeming fish, including salmon, halibut, eulachen and herring, the great variety of berries and many other edible plants, the sea and land mammals, the shell fish and seaweed of the tidelands, the forest timbers of cedar, spruce, hemlock, and cottonwood, stone, and even copper.

"The natives had a well-defined system of property ownership which was not unlike our own, except that the land was generally held in the name of a clan or house group, with joint usage by such an extended family. **Title to land** was obtained by inheritance or as legal settlement for damages; it was never bought or sold. It **was recorded** in the minds of all interested parties by elaborate ceremonials and the distribution of goods among the people (potlatches), which were necessary before land ownership could be recognized. **Deeds were sometimes further recorded** in the carvings of the famous totem poles."

To substantially the same effect is the rest of the evidence, from which we could continue to quote indefinitely. But in order to keep this preliminary statement within reasonable bounds we must largely content ourselves with such general references as to *Defendant's* Exhibit 5 (R. 9) in which an entire Chapter II (beginning

at page 54) is devoted to the subject of *Tlingit* clan property, and with two more especially pertinent quotations from *Defendant's* Exhibit 6 (R. 9) —

> "Each subdivision of the Tlingit had at least one winter village [in this instance Wrangell] * * *. Each clan of a village went to its fishing, berrying, and hunting places each year, and returned to the village to lay away stores for the winter." (Page 19.)

and, under the title, "Review of Community Boundaries"—

> "(3) that each community [e.g. Wrangell] has a distinct territory recognized by themselves and by the neighboring communities; (4) that these lands were held under a recognized tenure system by the clans of which each community consisted; (5) that the ownership of land was recorded in tradition by means of the potlatch and totem pole; (6) that the lands, beaches, and waters were used intensively by the ancestors of the people now [1946] dwelling in the area, according to native matrilineal succession; (7) that the usages to which these lands, beaches and waters were put continue to be significant in the daily life of the natives living in this area * * *." (Page 32.)

And as still further *indicia* of what even from our modern standpoint may be deemed to be the relatively higher culture of the *Tlingit*, mention might be made of their permanent wooden houses often 60 feet in length by 40 or 50 feet in width. Tr. 12-13; Plaintiff's Exhibit 11 (R. 8), page 11; *Defendant's* Exhibit 6 (R. 9), particularly pages 10-11; and cf. *Defendant's* Exhibit 5 (R. 9), pages 28-30. See picture of such a house in Plaintiff's Exhibit 11, page 11.

Turning now to certain other considerations developed in the *Shoshone* opinion, here is no "vague" or "nebulous" claim to millions of acres, but a specific claim to only a specific *part* of a specific and intensively used 350,000 acres

(R. 1, 28)* the "aboriginal use and ownership" by petitioner clan of most of which is already conceded and proved by *Defendant's* Exhibit 6 (R. 9), Chart 11. (Note the legend "Tihitan" imposed at least six times on the map of Prince of Wales Island and neighboring areas in that Chart.) Here is no ancient, ambiguous treaty to be construed. Nor are the courts asked to go back "three quarters of a century", or to award anything to "descendants" of a wronged earlier generation. On the contrary the wrong here complained of is a current one which did not occur until 1951, and the clan membership today is substantially the same as then. And by the same token here is no item of interest looming up in astronomical amounts which overshadow that of the principal claim itself. Nor do such matters as measure of damages or judgment offer any insuperable difficulties. For without prejudice to full consideration of the former at a proper time and place, it is obvious that the quantities and prices quoted in the specifications prepared by the Government and incorporated in the Timber Sale Agreement (Plaintiff's Exhibit 4, R. 8), are pertinent evidence on that issue. And so far as concerns a possible judgment, here is no special jurisdictional act like that in *Shoshone* where the attorneys would have been the only prospective cash beneficiaries. For this suit is brought under 28 U.S.C., Sec. 1505—one of the several sections of Chapter 91 dealing generally with the jurisdiction of the Court of Claims. If petitioner prevails it will be in exactly the same position as any other successful plaintiff in that court.

Under all these circumstances we submit that the instant case and its supporting argument is entitled to considera-

*Comparison of Petitioner's Exhibit No. 5 (R. 8) with its Exhibit No. 3 (Tr. 34-35) and R. 27-28 shows that the 1951 Timber Sale Agreement did not include Zarembo Island, and that the area actually involved in the instant case is therefore very substantially less than the total 352,800 acres of the entire Tebbit-ton area. In a word, the whole area here involved is only about one-quarter the maximum size attained by a world famous *individually owned* ranch right here in the States.

tion strictly on its legal merits as any other law suit, unprejudiced and uninfluenced by conscious or even subconscious considerations along lines which so understandably crystallized in the *Shoshone* case, *supra*.

This would also seem as appropriate a place as any other to mention—even if it is a little by way of anticipation—a somewhat similar consideration which points to a similar conclusion. A few pages further on in Point I of this brief the leading case of *Johnson* v. *McIntosh*, 8 Wheat, 543, will be discussed and quoted from at length. But except for a passing reference at that point to certain apologetic and even ironical aspects of Chief Justice Marshall's opinion the present is perhaps a better connection in which to point out the extent to which the final decision in that case may well have been influenced by practical considerations of what might be loosely packaged under the general heading of estoppel. True, that opinion, like a modern skyscraper and its steel framework, is built around a consistent and logical skeleton of legal reasoning anchored on a firm foundation of sound principle. But one cannot read it as a whole without realizing how replete it is with none too subtle intimations that its end result so necessary to support the validity of the great mass of existing titles throughout the United States was from the very outset what we would call in today's vernacular a "must". Cf., for example, pages 572, 574, 579, 580, 587, 588-589. Space does not permit full quotation from those pages, and we limit ourselves to two. One is factual—

> "Yet almost every title within [New England, New York, New Jersey, Pennsylvania, Maryland, and a part of Carolina] is dependent on these grants." Page 579.

The grants referred to were, of course, the grants by the crown of the soil which was still in the occupation of the Indians. The other quotation is typically apologetic—

> "Although we do not mean to engage in the defense of those principles which Europeans have applied to

> Indian title, they may we think find some excuse, if not justification, in the character and habits of the people whose rights have been wrested from them." Page 589.

The immediate significance of all of which is simply that in the instant case there can be no possibility of any such feeling of compulsion of any sort. Until 1951, no one other than the Indians had acquired any rights, vested or otherwise, in the soil of the virgin forest which covers the area here in suit. Indeed, to the best of our present information there have for years been no white men on the area with the possible recent exception of one casual squatter near Point Baker.

I. Petitioner's aboriginal full proprietary ownership continued unimpaired throughout the period of Russian sovereignty, and the court below therefore erred in its fallacious premise that somehow or other that ownership had been cut down to mere so-called "original Indian title".

Issue 2.

This Point and the immediately following Point II deal with Issue 2 (R. 7), which is again repeated for convenient reference—

> "2. What property rights, if any, would plaintiff, after defendant's 1867 acquisition of sovereignty over Alaska, then have had in the area, if any, which from aboriginal times it had through its members, their spouses, in-laws, and permittees used or occupied in their accustomed Indian manner for fishing, hunting, berrying, maintaining permanent or seasonal villages and other structures, or burying the dead?"

Aboriginal ownership.

Under the terms of the February 4, 1953, order below (R. 7-8) decision of the geographical extent of petitioner's ownership is reserved for further proceedings, but the court below has already found as a fact that petitioner is-

a clan of *Tlingit* Indians (paragraph 7 at R. 27), and on the basis of the record already made has in its opinion similarly conceded that some part, at least, of the lands originally exploited by the Tee-hit-ton was claimed by petitioner clan as a whole (R. 18), and that the aboriginal clan "had a species of ownership in the lands which they used for hunting, fishing, and berry picking" (R. 18).

Such an understatement by that court is difficult to understand in the light of our having quoted at the same length in our brief to it from all three of the cases to which we now turn. But be that as it may, this Court has unqualifiedly recognized from the very outset that full proprietary ownership of the soil at the communal level of the tribe or group was a definite legal attribute of aboriginal Indian title. Indeed the very premise of that much cited leading case, *Johnson* v. *McIntosh*, 8 Wheat, 543, 574, was that—

> "The original inhabitants * * * were admitted to be the rightful occupants of the soil, with a **legal** as well as a just claim to retain possession of it, and to use it according to their own discretion * * *."

The nature of that facet of Indian title was still further amplified in *Mitchell* v. *United States*, 9 Peters 711, 745-746—

> "friendly Indians were protected in the possession of the lands they occupied, and were considered as **owning** them by a perpetual right of possession in the tribe or nation inhabiting them, **as their common property** * * *.
>
> "Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were * * * respected. * * * Such, too, was the view taken by this Court of Indian rights in the case of *Johnson* v. *McIntosh*, 8 Wheat. 571, 604, which has received universal assent."

And a generation later the same basic premise was reiterated and elaborated in *Holden* v. *Joy*, 17 Wall. 211, 243-244—

> "Beyond doubt the Cherokees were the **owners** and occupants of the territory where they resided before the first approach of civilized man to the western continent, deriving their **title** as they claimed from the Great Spirit, to whom the whole earth belongs, and they were unquestionably the sole and exclusive masters of the territory, and claimed the right to govern themselves by their own laws, usages, and customs. * * *
>
> "Enough has already been remarked to show that the lands conveyed to the United States by the treaty were held by the Cherokees under their original **title**, acquired by immemorial possession, commencing ages before the New World was known to civilized men. **Unmistakably their title was absolute,*** subject only to the preemption right of purchase acquired by the United States as the successors of Great Britain, and the right also on their part as such successors of the discoverer to prohibit the sale of the land to any other governments or their subjects, and to exclude all other governments from any interference in their affairs. Evidently, therefore, the Cherokees were competent to make the sale to the United States * * *."

That full proprietary ownership of the soil at the communal level of the tribe or group was a definite attribute of aboriginal Indian title has thus become established law.

Indeed if this proposition needed further support it can be found specifically in the case of a clan of *Tlingit* Indians such as this petitioner. For in a Government report intro-

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* Although the remainder of this sentence deals with what is now known as "original Indian title", these first five words are "unmistakably" descriptive of the preceding consideration of aboriginal title.

duced in evidence by the respondent itself we have already learned that—

> "The **Tlingit** and Haida Indians * * * developed one of the highest forms of civilization in aboriginal America north of Mexico. It was rich in ceremony and creative arts, and complex in its social, legal and political systems. * * *
>
> "The natives had a well defined system of property ownership which was not unlike our own * * *. Title to land was obtained by * * *. It was recorded in the minds of all interested parties by elaborate ceremonials * * *. Deeds were sometimes further recorded in the carvings of the famous totem poles." (Defendant's Exhibit 6, R. 9, page iv.)

And Chart 11 of the same Exhibit shows at least six portions of the Wrangell area as having been in the "aboriginal use and ownership" of the "Tihitan" (one of the many common variations in the English spelling of petitoner's name).

Thus petitioner's chain of title starts with unquestioned full proprietary ownership. The court below held in its opinions and its conclusion of law that somehow prior to the treaty of 1867 that ownership had been impaired down to what is known as mere "original Indian title" (R. 32). That such a concluson is utterly unfounded will be the subject of the following pages of this Point.

"Original Indian title."

First of all just what is this concept which is now so generally and so indifferently called "original Indian title"? The implications of its name are indeed so misleading that before going further it is of prime importance to thoroughly explore its precise meaning and significance. There probably has been no better short definition than that found at page 46 of the opinion joined in by four members of this Court in *Alcea Band of Tillamooks* v. *United States*, 329 U. S. 40—

> "It has long been held that by virtue of discovery the title to lands occupied by Indian tribes vested in the sovereign. This title was deemed subject to a right of occupancy in favor of Indian tribes, because of their original and previous possession. It is with the content of this right of occupancy, this original Indian title, that we are concerned here."

It is highly significant that the writer of that opinion deemed it necessary to cite in its footnote only a single supporting authority; viz., *Johnson* v. *McIntosh*, 8 Wheat. 543, 573-74 (1823), a case which we will shortly discuss at quite some length.

In considering that case, however, it should contribute to clearer thinking to bear in mind two thoughts. One is that on final analysis this concept of "original Indian title" will prove to be more in the nature of an end result rather than a true principle of law as it might be supposed to be after having occurred more than thirty times in the opinions in the case just quoted from. The other, and much more to the point is that its content is just about as far removed from that of aboriginal title as are the two poles. We have just seen how true aboriginal title includes all the incidents of full proprietary ownership. But so-called original Indian title is merely the right of continuing an initial aboriginal occupancy or in a word it is simply a right to stay put. Its only relation to aboriginal title is that it may have started back there, but today the term denotes only the mere residuum which is left after stripping away all the other valuable incidents which go to make up full ownership.

It is only fair to say, however, that the misleading name and the unhappy aura of misrepresentation which has thus become almost an integral part of this concept are no fault either of the great judge who first stated it (but did not name it) or of the present generation of his brethren on the bench who inherited a ready made and apparently innocuous term. That part of it seems to have grown up

spontaneously during the many intervening years, and it would serve no useful purpose at this time to delve further into the story of a name.

But it is extremely worth while and necessary to go back a century and a quarter and find out just how the concept itself came about. It first saw the light of day as a judicial decision *reached in the conventional manner of applying a general principle to facts of a particular case.* That is of prime importance because we ask only that this Court follow that same pattern and apply that same principle, which incidentally has never since been subjected to the slightest question. In passing it may clear the air to explain briefly how the universal stateside treatment of this concept as a rule of law, while not technically correct, is nevertheless logical and reasonable enough. And in any event readily understandable. For the historical facts of European discovery to which the controlling principle has applied have been so uniform throughout the area of the forty-eight states that arrival at the same result has been inevitable—and indeed in most instances has been taken for granted by all concerned—and opinion writers have had no occasion to stop to consider whether a different result might have to be reached somewhere else, as for example in Alaska.

Johnson v. McIntosh.

All of which takes us squarely back to that great fountain-head of all law on Indian titles, the only case which was cited or even needed to be cited in the *Tillamooks* opinion, *supra*. *Johnson* v. *McIntosh*, 8 Wheat. 543, is the source of everything that is known today as "original Indian title". It first saw the light of day as a judicial decision reached in the conventional manner of declaring a principle and then applying that principle to facts, and *we ask only that this Court follow that same pattern and apply that same sound principle which has never been questioned to this day.*

The issue in that case was very clear. Could a good title to land be sold and conveyed by the stateside Indian tribes which at the time of the discovery of America "were . . . the absolute owners and proprietors of the soil" (page 545)? This Court's answer was in the negative—for reasons developed in the opinion by Chief Justice Marshall.

The land involved in that particular case lay in the state of Illinois, but the opinion reviewed at length the story of how "our whole country has been granted by the crown while in the occupation of the Indians". (Page 579.) But in this instance no abstract principle such as judicial supremacy or the implied powers of Congress had to be developed through those long processes of metaphysical reasoning for which its writer is so justly famous. On the contrary in the very opening paragraphs of the opinion that great judge himself disavowed any such necessity and recognized that the controlling principles had long since been established, and that *judicial inquiry was to be directed rather toward determination of the historical facts to which they were to be applied.* We quote from page 572—

> "The inquiry, therefore, is, in a great measure, confined to the power of Indians to give, and of private individuals to receive a title which can be sustained in the courts of this country. "As the right of society, to prescribe those rules by which property may be acquired and preserved is not, and cannot be drawn into question; as **the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie**; it will be necessary, in pursuing this inquiry, to examine, not singly those principles of abstract justice, which the Creator of all things has impressed on the mind of his creature man, and which are admitted to regulate, in a great decree, the rights of civilized nations, whose perfect independence is acknowledged; but those principles, also, which our own government has adopted in the particular case, and given us as the rule for our decision."

The opinion then plunges into a lengthy—and at times highly apologetic and even ironical—historical review of the none too pretty picture of discovery and conquest of this continent by "the great nations of Europe"; of a tacit and patronizing agreement among themselves that "bestowing" the boon of "civilization and Christianity" on the natives "made ample compensation" for taking over much of the latters' unlimited independence, including the power to dispose of the soil at their own will; of consistent claiming, exercising, implementing, and asserting that newly acquired "dominion" over the soil through the medium of large grants to their own subjects of "the exclusive right of purchasing such lands as the natives were willing to sell";* of eventual succession of the United States to sovereignty (and with it to the related responsibility of protecting established titles) at a time when "the property of the great mass of the community" traced back to purchases or deals of one kind or another under those very grants; and of the imperative practical necessity for final confirmation of such titles by the Court over which he presided.

That intensive historical review, covering as it does the greater part of the remaining thirty odd pages of the opinion, painstakingly enumerated each of those predecessor "great nations of Europe", and their respective discoveries, wars, negotiations, and treaties, even down to the then recent "magnificent purchase of Louisiana" and "our late acquisitions from Spain". Its enumeration included the activities of all the nations whose discoveries are now embraced within the boundaries of any of our forty-eight states—Spain, France, Holland, and England. Portugal was also mentioned as having sustained her claim to the Brazils by the same title. But significantly enough, and correctly so, there was no reference whatever

* This particular quotation is from Marshall's later opinion in *Worcester* v. *Georgia*, 6 Pet. 514, 545, although the thought is from *Johnston* v. *McIntosh*.

to Russia although the interests of American traders and whalers in Alaskan waters had by 1823 when this opinion was written already become the subject of open diplomatic negotiations.

Thus the concept of original Indian title is at most a stateside end result, and as such is necessarily of no controlling effect one way or the other in Alaska. But the underlying principles upon which it rests, and which it necessarily implies, are fundamental and of general application. Particularly so the already quoted rule from *Johnson* v. *McIntosh*, supra, that

> "the title to lands * * * is and must be admitted to depend entirely on the law of the nation in which they lie." (Page 572.)

and the pattern established by this Court in applying that fundamental principle to cases involving Indian lands.

Before passing on let us have clearly in mind that that pattern calls for judicial inquiry by the courts into the historical or other background necessary to the application of the principle just quoted, and for determination of "the law of the nations" in which the lands lie. Just as this Court in that case went at length into "further proofs of the extent to which this principle has been recognized" (page 581), so let us look into the applicable law and policy or absence thereof under Russian sovereignty.

The Russian era.

How totally different in every material respect was the Alaska picture back in the pre-1867 Russian days. In *Johnson* v. *McIntosh* this Court apparently had to supplement the record by taking judicial notice of historical facts of common knowledge, but here the pre-American story is fully developed in paragraphs 9-16 of the findings of fact at R. 28-30, and it is urged that these paragraphs be read again at this point. Briefly, so far as concerns the *Tlingit* area, there was, with only minor exceptions any-

where and none in the area presently involved, no interference with the natives' use or ownership of the soil, no grants to non-natives of any interest in the soil, no assertion of even a right to make such grants. On the contrary pioneering Russian subjects were on more than one occasion expressly and very formally admonished to respect the natives' aboriginal rights, and in particular to secure their consent to the establishment of even a trading post (R. 28-30).

At the very end of the era in 1867 the Russian Government formally advised our Secretary of State that

> "no attempts were made, and no necessity ever occurred to introduce any system of land ownership." (R. 30.)

By the same token the plaintiff's aboriginal ownership under *Tlingit* law and custom thus remained unimpaired at the time of the cession to respondent in 1867.

That there should have been such a radical difference between the policies of Russia and those of the other European nations which at one time or another exercised sovereignty over what is now American soil can indeed be readily understood. England, Holland, France, Spain, and Portugal were as Chief Justice Marshall himself expressly termed them in his later opinion on the same subject in *Worcester* v. *Georgia*, 6 Pet. 515, 543, "great maritime powers".* Their discoveries and colonization

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* Some interesting background with respect to Russia not having been a party to the tacit agreement of the "great maritime powers" referred to by Chief Justice Marshall may be found in the Government's own recent brief in another case—Brief of the United States on Preliminary Hearing in Indian Claims Commission Docket No. 31, *Clyde F. Thompson et al.* v. *United States*. Under the sub-heading "Basic Concepts" at pages 7-9, the history of this doctrine of discovery as developed by Chief Justice Marshall in *Johnson* v. *McIntosh* is amplified by projecting the reader's thinking even further back to its very beginnings in the 14th Century. Citing a bull issued by Pope Clement VI in 1344, and two bulls by Pope Alexander VI in 1493, it is pointed out that "this dogma

in America stemmed from explorations largely actuated in the first instance by the pressures of expanding populations and the urge to find a shorter route to the fabulous riches of the Indies. Such a common objective of material aggrandizement on a national scale quite naturally led to appropriation and distribution of the vast reaches of land which constituted the principal wealth of the New World. Russia on the other hand was not primarily a maritime nation, and indeed already had ample territory in both Europe and Asia. Russian explorations in the higher latitudes of contiguous Northern Asia, by portages from one river to another, were more in the nature of gradual expansion by hunters and traders than of outright discovery.

What is even more to the point, at no time during the Sixteenth Century era of discovery was Russia confronted with any competitive discovery or expansion—whichever way its own activities may be catalogued—and thus had no occasion to participate in any understanding with other nations on this subject. Indeed it was not until almost the dawn of the Nineteenth Century (R. 28) that Russia took any active interest in Alaska. In any event neither the present record nor recorded history show any indication whatever of Russian participation in the tacit understanding among its European neighbors.

Then too, by the time Russia finally did take over Alaska at least two centuries had gone by since the golden age of European exploration, and during that period the international attitude toward discovery had changed appreciably—

> "In the early days of European exploration it was held, or at least every state maintained with respect

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was, in its inception, a Roman Catholic creation" as "it must be remembered that prior to the Act of Supremacy by Henry VIII in 1534 *all of the maritime powers* of Europe belonged to that faith" (italics supplied). It is well within the judicial knowledge of this Court that Russia, for centuries a stronghold of the Orthodox Greek Church, was never a Roman Catholic power.

to territories discovered by itself, that the discovery of previously unknown land conferred an absolute title to it upon the state by whose agents the discovery was made. But it has now been long settled that **the bare fact of discovery is an insufficient ground of proprietary right.** It is only so far useful that it gives additional value to acts in themselves doubtful or inadequate." Treatise on International Law, W. E. Hall, 5th Ed. (1904), page 101.

This gradual evolution—and contraction—of the so-called doctrine of discovery finds ample confirmation in the authorities, as for example in the following quotation from "Mr. Upshur, Sec. of State, to Mr. Everett, Oct. 9, 1843, M.S. Inst. Great Britain, XV, 148, 149" as re-quoted in John Bassett Moore's classic International Law Digest, Vol. I, page 259 —

"How far the mere discovery of a territory which is either unsettled or settled only by savages, gives a right to it, is a question which neither the law nor the usages of nations has yet definitely settled. The opinions of mankind, upon this point, have undergone very great changes with the progress of knowledge and civilization. Yet it will scarcely be denied that rights acquired by the general consent of civilized nations, even under the erroneous views of an unenlightened age, are protected against the changes of opinion resulting merely from the more liberal, or the more just views of after times. The right of nations to countries **discovered in the sixteenth century** is to be determined by the law of nations as understood *at that time*, and not by the improved and more enlightened opinion of three centuries later." (Italics as in the original; black face type emphasis supplied.)

In order to keep the length of this brief within reasonable bounds we must content ourselves with only one further quotation in this field. The following from The Law of Nations in Time of Peace (1861) by Sir Travers Twiss is of interest on more than one aspect of our own inquiry. After referring in Secs. 115-116 to the rights of

"property" and "legal possession" arising from discovery and occupancy he continues in Sec. 117—

> "The principles applicable to such questions were discussed by the Commissioners of the United States of America, in the negociations with the Commissioners of Spain, on the subject of the Western boundary of Louisiana. The principles, they observe, which are applicable to the case, are such as are dictated by reason, and have been adopted in practice by European Nations in the discoveries and acquisitions which they have respectively made in the New World. The first of these is that, when any European Nation *takes possession of any extent of seacoast, that possession is understood as extending into the interior Country, to the sources of the rivers emptying within that coast, to all their branches, and the country they cover*, and to give it a right in exclusion of all other Nations to the same." (Italics as in the original.)

We digress for just a moment to remind the Court not only that the findings offer no suggestion that the Russians ever "discovered" even the coast of Prince of Wales Island on which the area here in question is located (cf. paragraph 15 at R. 29-30), and that the evidence already taken indicates affirmatively to the contrary (Tr. 46-47).

It is only fair to assume that Chief Justice Marshall knew exactly what he was doing at page 572 of his opinion in *Johnson* v. *McIntosh, supra*, when he timed the tacit agreement among the great nations of Europe as having occurred "on the discovery of this immense continent" —long before the Russian advent in Alaska.

Be that as it may, however, the fact is clear that up to 1867 when Imperial Russia ceded Alaska to the United States aboriginal Indian ownership in *Tlingit* Alaska, in which alone we are presently interested (see especially paragraphs 7 and 12 of the findings of fact at R. 27, 28) had undergone no impairment.

The opinion below.

The decision below should be reversed because it is essentially bottomed on an erroneous conclusion of law that petitioner's "interest in the lands prior to the treaty of 1867 was original Indian title" (R. 32). The fundamental error of such a conclusion has, we trust, been amply demonstrated in the preceding pages. It is also interesting to note that not having been advanced as a defense by the Government, that theory was introduced into the case wholly on the Court's own initiative, and that in its effort to refute our position its opinion offered only two suggestions—both of which are demonstrably erroneous. One is an error of commission, the other an even more startling one of omission.

It is most significant that in a rather sizeable opinion the only reasoning which purports to support that conclusion should have to be based in its turn on an absolutely false premise. Beginning about ten lines from the bottom of R. 18 the whole crux of that reasoning is refutation of a claim attributed to petitioner to the effect that its aboriginal ownership "was recognized" by the Russian sovereign and thereby given the legal status of full and complete ownership. We agree with the opinion as it goes on to say that the court thinks that "that asserted historical fact" has not been proved, and so on. But the trouble with that line of reasoning is that petitioner has never at any time made any such assertion, and naturally was not interested in any attempt to prove it. An exhaustive examination of those pages of either of our briefs below which dealt with the Russian aspect of the matter reveals no use of the word "recognize" or any equivalent thereof. *The setting up of such a straw man so that it can be knocked down stands almost as self-confessed inability to dispose of our case in any other way.* Our argument below was substantially the same as that in this brief to the effect that petitioner's ownership had continued "unimpaired" under Russian sovereignty. The same cases

were cited, except that it would seem appropriate to note at this point the following quotation which both in our brief below and in this brief appears more fully in another connection—

> "That by the law of nations, the inhabitants, citizens or subjects of a conquered * * * country, territory, or province, retain all the rights of property which have not been taken from them by the orders of the Conqueror, * * * and remain under their former laws until they have been changed." (*Mitchell* v. *United States*, 9 Pet. 711, 731.)

We are not interested in what the Russian Government could have taken if it wanted (see R. 19), or in what it may have taken elsewhere in Alaska. We are interested only in a *Tlingit* area which it did not take.

In our briefs below there were cited or quoted at substantially the same length as in this Point I and in Point II and III of this brief some twelve decisions of this Court other than the *Tillamooks* case, *supra*. All of those cases are in point and, we submit, many of them are controlling. But not one was cited or even mentioned in the opinion below. Not even *Johnson* v. *McIntosh*, although most of nearly two hours of argument and reargument in open court was devoted to consideration of that one case. An omission of that sort can not be explained away. *Avoidance on such a scale again can mean nothing less than a confession of inability to meet and answer petitioner's argument.*

Summary.

And so we come to the end of Russian sovereignty and to the 1867 treaty with petitioner's full ownership still unimpaired.

II. The 1867 Treaty of Cession had no legal effect one way or the other upon petitioner's interest in its lands, irrespective of what may have been the nature or extent of that interest, and under American sovereignty from 1867 to 1951 there was no impairment thereof by our government.

Distinction between sovereignty and title.

Basic to this whole case, and particularly to this aspect of it, is the essential distinction between sovereignty and title as the latter term is ordinarily used to signify the immediate and direct proprietary ownership of the soil. For example, the United States exercises sovereignty over all four corners of 17th Street and Pennsylvania Avenue, N. W., but it owns and has title to only two of them. The building in which this case was tried and decided below falls within the category which an eminent authority who has already been quoted describes as "land and buildings in which the immediate as well as the ultimate property is in the hands of the state." (International Law, W. E. Hall, 5th Ed., page 419). Cf. *Johnson* v. *McIntosh*, 8 Wheat. 543, 548; *United States* v. *California*, 332 U. S. 19; *United States* v. *Texas*, 339 U. S. 707; *Alabama* v. *Texas*, 347 U. S. 272).

Treaties of purchase and cession are a familiar concept in both international law and American history. By their very nature they have to do primarily with sovereignty rather than with title, and that is equally true of the purchase and cession of territory occupied by Indians.

Thus, under the famous Louisiana Purchase Treaty of 1803 we acquired sovereignty over a vast territory, but, as we have learned in the preceding pages we inherited as an incident of that sovereignty only an exclusive right to purchase or otherwise acquire whatever was needed to complete our full title to the soil. And that full title to the soil of the "public lands" which were homesteaded to a later generation was in turn perfected only by a series of subsequent purchases from its Indian *owners* of that which

is now known as their "original Indian title". For example, in what is now Iowa 9000 square miles were thus acquired under the Black Hawk Treaty of 1832 (Encyclopedia Brittanica, 11th Ed., Vol. 14, page 735; 7 Stat. 374). In what is now Missouri the Indian title to two-thirds of the state had been acquired by 1808, and the title to the rest of the state was cleared by the Shawnee Treaty of 1825 (id., Vol. 18, p. 613; 7 Stat. 284). In what is now Minnesota, the Indian titles east of the Mississippi were acquired under the Chippewa and Sioux Treaties of 1837, and under two Sioux Treaties of 1851 most of the land west of the Mississippi was acquired (id., Vol. 18, pp. 552-553; 7 Stat. 536, 538). And so on. In the same way we acquired sovereignty over Florida under the Florida Purchase Treaty of 1819. But it was not until 1832 and 1833 that the Seminoles exchanged their lands for equal areas in the West (id., Vol. 10, p. 545; 7 Stat. 368, 423). The Report of the Commissioner of Indian Affairs for 1872 recites a total of 372 such purchases and acquisitions of Indian title to the soil as having been negotiated up to that time.

The Treaty of 1867.

The Alaska Purchase of 1867 was not substantially different from the earlier purchases of Louisiana or Florida or California. The treaty clearly transferred all Russian sovereignty, together with "all real property belonging to the Government". Its full text is reported at 15 Stat. 539, is incorporated by reference in paragraph 18 of the findings of fact at R. 31, and is printed in the Appendix at page 64, *infra*. It contains no express reference to Indian possessions, but neither does it afford any basis for torturing its language to make out that Russia ever purported to sell something which it did not own, nor has respondent ever so claimed.

Controlling decisions of this court.

For that matter Russia could not have done so even had it tried. This Court in *United States* v. *Percheman*, 7 Pet. 51, 87, and *Strother* v. *Lucas*, 12 Pet. 410, 438, had long since declared unequivocably that

> "In following the course of the law of nations, this court has declared that even in cases of conquest, the conqueror does no more than displace the sovereign, and assume dominion over the country. [cases cited.] A cession of territory is never understood to be a cession of the property of the inhabitants. The king cedes only that which belongs to him * * * ."

Even earlier in *Soulard* v. *United States*, 4 Pet. 511, 512-513, a case involving titles in the Territory acquired under the Louisiana Purchase Treaty in which the United States had "stipulated that the inhabitants of the ceded territory should be protected in the free enjoyment of their property", this Court had very pertinently noted that

> "The United States, as a just nation, regards this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract.
>
> "The term 'property', as applied to lands comprehends every species of title inchoate or complete. It is supposed to embrace those rights which lie in contract; those which are executory; as well as those which are executed. In this respect the relation of the inhabitants to their government is not changed. The new government takes the place of that which has passed away".

And of special interest in connection with paragraphs 10-14 of the findings at R. 28-29 is a later paragraph of the same opinion—

> "The edicts of the preceding governments in relation to the ceded territory; the power given to the governors, whether expressed in their commissions, or in

> special instruction; and the powers conferred on and exercised by the deputy governors, and other inferior officers, who may have been authorized to allow the inception of title; are all material to a correct decision of the cases now before the Court, and which may come before it."

In *Mitchell* v. *United States*, 9 Pet. 711, 731, an Indian case, there were set out in even greater detail—

> "some general results of former adjudications which are applicable to this case, are definitely settled, so far as the power of this court can do it, and must be taken to be the rules of its judgment. They are these:—
>
> "'That by the law of nations, **the inhabitants**, citizens, or subjects **of a** conquered or **ceded country**, territory or province, **retain all the rights of property which have not been taken from them** by the orders of the conqueror, or the laws of the sovereign who acquires it by cession, **and remain under their former laws until they shall be changed.**
>
> "'That a treaty of cession was a deed or grant by one sovereign to another, which transferred nothing to which he had no right of property, and only such right as he owned and could convey to the grantee * * *."

All of which is in full conformity with those great fundamentals declared at page 746 of the same opinion that

> "Indian * * * hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals."

Thus it came about that in 1867, *after* Russia had ceded Alaska to the United States, petitioner came under American sovereignty with its original ownership of its lands still unimpaired.

The opinion below.

If we seem to digress from the orderly presentation of the legal aspects of petitioner's chain of title by stopping to discuss the opinion below before passing on to consideration of the American era in Alaska, it is only because this section of this Point is so closely tied in with and is almost a part of the immediately preceding section about the controlling decisions of this Court.

That opinion at the middle of R. 19 first refers to the possible effect of the treaty, passes the question for the moment, picks it up again near the top of R. 20, devotes to it the equivalent of practically three printed pages of the record through R. 22, and then near the bottom of the latter page notes inconclusively that "we do not resolve [that question]".

In view of its "answers to other questions" its failure to rule on this one was proper enough procedurally—even though based on a wholly erroneous conception of the law of those other questions. But we cannot let pass without comment the amazing nature of its discussion of the point. Frankly, we cannot understand how it could say so much without saying something more. True we did criticize at length the *Miller* case cited by the Government and we have no criticism of what is said about the confusion to which that case has given rise. But we did something more too. In our principal brief we cited *and quoted at substantially the same length as in this Point* all four controlling decisions *of this Court* which we have just briefed on the immediately preceding pages. But not one was even referred to in the three page discussion at R. 20-22.

The American era.

Whatever may have been the potential governmental power of the United States to extinguish petitioner's ownership either by *force majeure* or by amicable negotiation, the simple fact remains that there has been no such

overall taking or extinguishment. Nor could there have been, for again irrespective of the potential nature or extent of that power there is no question that it could have been exercised only by Congress or under its specific authorization. *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 585.

Congress has taken no such action of either sort. On the contrary, what little legislation there has been in this general field all trends in just the opposite direction, as is indeed most pointedly suggested in the opening words of the very Act of August 8, 1947, under which the Timber Sale Agreement which gives rise to the case at bar was authorized—

> "That 'possessory rights' as used in this resolution shall mean all rights, if any should exist, which are based on aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), whether claimed by native tribes * * *" (61 Stat. 920).

It is common knowledge that from the time of its acquisition in 1867 until 1884 Alaska was almost completely neglected by Congress. It did not become a Territory until 1912, but the so-called Organic Act of May 17, 1884, 23 Stat. 24, established a District of Alaska, and also included a proviso—

> "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

The other statutes* cited in the excerpt from the Act of August 8, 1947, quoted in the preceding paragraph are

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* All of these enactments are further considered in Point III *post*.

to much the same effect, and then there is a gap of nearly half a century until the passage of the above quoted Act of August 8, 1947.

It is true that section 3(b) of that Act expressly disclaims either denial or recognition of the validity of any particular claim such as that here in suit. But the very fact of its enactment at all—authorizing as it does the sale of timber notwithstanding any such claim of "possessory rights", and requiring in section 3(a) that all proceeds from such a sale be held in a special account in the Treasury "until the rights to the * * * timber are finally determined"—cannot be construed otherwise than as an unusually specific Congressional recognition that in any event there has been under American sovereignty no overall or large scale extinguishment of such "rights". And any small takings of a few acres here or there, and presumably under authority of law, have been so infrequent as to be of practically negligible importance in the present connection.*

Summary.

It thus appears that, with possibly negligible exceptions such as just noted, petitioner's aboriginal ownership of the entire area covered by the Timber Sale Agreement has never been extinguished, but on the contrary has remained unimpaired under Russian sovereignty, under the 1867

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* In any event the details as to the locations and acreage covered by any such takings are peculiarly within the knowledge of respondent, and petitioner is entirely willing that for purposes of the present case the total area described in paragraph 8 of the recommended findings be reduced in accordance with any such information which respondent may care to submit in due course. (Such fragmentary information as is available to petitioner indicates as the probable extent of such takings of forest lands only two patents (Nos. 595,956 near Lake Bay and 890,760 near Red Bay) and a few lighthouse reservations at Bushy Island (Executive Order 3406), Point Colpoys (Executive Order 3406), Point McNamara (Executive Order 4257), Kindergarten Point, Vichneffsky Rock, and Bluff Island). There are no townsites or improved plots within the area here in suit.

Treaty of Cession, and under American sovereignty until the 1951 partial taking which gives rise to this case.

Administrative confirmation of our case.

Because what we are about to discuss does not involve administrative interpretation of an ambiguous statute and hence may not actually rise to the full dignity of argument, and also because it does not relate exclusively to Points I and II, we have not included it in the main body of this Point preceding the Summary on this page. But because it does show that what has just naturally had to happen over the years in the normal every day conduct of the public business by those charged with primary administrative responsibility as to Alaska at the same time strongly confirms our own thinking in these two Points I and II—as well as in some of the pages to which we are coming—we know of no better place in which to record it.

Seldom indeed has a plaintiff come into the Court of Claims with such ample support of its position at all administrative levels. For in addition to such general statements as those of the President of the United States and the Governor of Alaska already quoted at pages 7-9 of our Petition for Certiorari—not to speak of Secs. 1 and 3(a) of the Act of August 8, 1947, already quoted in full at pages 2-3, *supra*, all of which show very express recognition of the seriousness of these questions, there will now be cited instance after instance of specific administrative action which in turn offers specific confirmation of the case presented in this brief.

Solicitor's Opinion M. 31634.

This opinion is quite long. It is reported at 47 I.D. 461, but will also be found printed in full at pages 415-426 of Plaintiff's Exhibit 12 (R. 8). Without necessarily committing ourselves as to all its details we commend it to the at-

tention of the Court, but our special interest is in its approval on February 13, 1942, by the Secretary of the Interior (id., page 426) which made it also the administrative action of that high official of respondent. In fact it constitutes almost triple administrative action. For more than three years later on July 27, 1945, and again on January 11, 1946, the Secretary of the Interior in administrative decisions expressly reaffirmed it (id., pages 434, 449, 452).

The question involved as stated in its opening paragraph (id., page 415) was the same as here, except that it happened to relate primarily to submerged lands—

> "Whether Indians of Alaska have any fishing rights which are violated by control of particular trap sites by non-Indians * * *

The answer (id., pages 415, 425) is squarely to the point—

> "I am of the opinion that this question must be answered in the affirmative. * * *
>
> "I conclude that **aboriginal occupancy establishes possessory rights in Alaskan waters and submerged lands, and that such rights have not been extinguished by any treaty, statute, or administrative action.**"

The Hydaburg, Klawock, and Kake claims.

For one reason or another certain limited powers to adjudicate Alaskan Indian claims which from time to time have been conferred upon the Secretary of the Interior have been very sparingly exercised. In 1945, however, the so-called Hanna hearings were held on the claims of the Indians of Hydaburg, Klawock, and Kake to areas near to, and in some instances immediately adjoining, this petitioner's area. The report, findings of fact, conclusions of law, and recommendations of R. H. Hanna, the Presiding Chairman, are printed in full at pages 426-433 of Plaintiff's Exhibit 12, and the administrative action of the Secretary of the Interior thereon is likewise printed in full at pages 434-453.

By and large his action squarely supports the position taken throughout this brief, although again we cannot fully acquiesce in certain incidental details as to which we reserve the right to present a different view at the appropriate time and place, as for example in our Point IV, *infra*. With this reservation we quote the concluding paragraphs of the Secretary's opinion of July 27, 1945 (id., page 449)—

> "A careful study of the cases and statutes confirms the basic conclusions of Solicitor's Opinion M. 31634: That submerged lands in Alaska are susceptible to such claims of aboriginal possession as were recognized by the act of May 17, 1884, and by subsequent legislation of the same tenor; that such rights, whatever they may be, have not been destroyed by the course of congressional legislation since 1884; and that whether such rights have been abandoned or otherwise extinguished or whether they still exist as valid rights today is entirely a question of fact to be decided on the available evidence in each particular case.
>
> "CONCLUSION
>
> "It is the duty of this Department to respect existing rights in disposing of the Federal public domain. This is true whether the public domain is land or water or a mixture of both, and whether the existing rights were established under Spanish, Mexican, Hawaiian, Danish, Choctaw, or **Tlingit law.** It makes no difference whether the evidence of such rights is found in papers sealed and notarized or in custom and the fact of possession, which is older than seals and notaries. Having attempted to discover the exact facts in these cases, the Department will govern its future actions accordingly. It will recognize that **the natives involved in these proceedings are entitled to the exclusive possession of approximately 190 acres per capita of land on which they live and which has remained in their possession since before our sovereignty attached.** It will continue to recognize that these natives have certain rights of user in other public lands, protected but limited by our conservation laws. It will take the position that all

> public lands in which Indian exclusive possession has been extinguished are hence forth open to settlement and disposal, and that whatever loss has been suffered by these Indians through such extinguishment is to be remedied by appropriate action in the Court of Claims. Such action has been authorized by a liberal Congress solicitous of our national honor and of our obligations to a brave and industrious people who are making a resolute endeavor to meet the problems of the white man's civilization. The Indians of Alaska have every reason to expect that the Congress and the Department will be equally solicitous to respect their rights in the land they have thus far retained for their own use, and that if the public interest should now or hereafter require that any of these retained lands be withdrawn from Indian ownership this will be done only under appropriate legislation which assures adequate compensation for that which is taken from them in the interests of a wider public."

Of more than mere passing interest is the term by which the Secretary of the Interior refers to the Indians in his supplemental opinion of January 11, 1946, (id., page 452) dealing with the tail-hold, storage, etc., areas required on the shore in connection with large commercial fish traps—

> "All such areas may, of course, be utilized by non-natives, but only with the consent of **the owners of the soil.**"

The Goldschmidt-Haas Report.

Next in point of time comes this official Report to the Commissioner of Indian Affairs, dated October 3, 1946, and dealing with the Possessory Rights of the Natives of Southeastern Alaska. A substantial part of this Report is in evidence in this case as Defendant's Exhibit 6 (R. 9). Again, we can not acquiesce in all of either its assumptions of law or its allegations of fact (cf. especially our express reservation of rights at R. 9). But again, its overall approach to the subject by and large confirms our whole basic position in this brief, as indeed could scarcely be otherwise in a technical report of this sort, representing

as it did the joint efforts of Agriculture's Anthropologist and Interior's Chief Counsel of the Office of Indian Affairs.

In particular we call attention to page iv and to Chart 11. We quote in part the Summary on page iv (from which we have already quoted more fully at page 10 of this brief)--

> "The Tlingit and Haida Indians have continuously used and occupied the lands and waters of Southeastern Alaska since before the first exploration in the area. They used all the bays, inlets, islands, and streams from a little south of the mouth of the Copper River to the southern tip of Alaska. Without knowledge of writing, hard metals or machinery, they developed one of the highest forms of civilization in aboriginal America north of Mexico. It was rich in ceremony and creative arts, and complex in its social, legal and political systems. * * *
>
> "The natives had a well-defined system of property ownership which was not unlike our own, except that the land was generally held in the name of a clan or house group, with joint usage by such an extended family. Title to land was obtained by inheritance or as legal settlement for damages; it was never bought or sold. It was recorded in the minds of all interested parties by elaborate ceremonials and the distribution of goods among the people (potlatches), which were necessary before land ownership could be recognized. Deeds were sometimes further recorded in the carvings of the famous totem poles."

And on Chart 11 will be noted the highly significant sub-title indicating that the Chart shows what is admittedly —and correctly—characterized as "aboriginal use and **ownership"** of the Wrangell territory. Also, that it expressly indicates at least six areas of such "aboriginal use and ownership" as having been "Tihitan".

The Hydaburg Reservation.

Most recent in this series is the order of a later Secretary of the Interior, dated November 30, 1949, in which a

neighboring area on Prince of Wales Island was set aside as a reservation.

The present significance of this Order is that it was expressly issued—

> "Pursuant to the authority vested in the Secretary of Interior by Section 2 of the Act of May 1, 1936 (49 Stat. 1250, 48 U.S.C., 1946 ed., sec. 358 a) * * *".

The very issuance of the order implied full administrative recognition of Indian rights in the land, as Section 2 of the 1936 Act authorized designation as such a reservation only—

> "of any area of land which has been reserved for the use and occupancy of Indians or Eskimos by Section 8 of the Act of May 17, 1884, (23 Stat. 26), or by Section 14 or Section 15 of the Act of March 3, 1891 (26 Stat. 1101) * * *."

The fact of administrative recognition in which we are presently interested is not affected by the subsequent setting aside of this order in *United States* v. *Libby*, 107 F. Supp. 697.

III. The Acts of 1884 and 1900 recognized and confirmed petitioner's aboriginal ownership and at the same time independently created a new and coexisting right of full proprietary ownership.

Issues 3 and 4.

This Point deals with a pair of issues so similar as to be readily arguable together as one—

> "3. What such rights, if any, would have inured to it under the Act of May 17, 1884, 23 Stat. 24, in the area, if any, which on that date was either so used or occupied by it or was claimed by it?
>
> "4. What such rights, if any, would have inured to it under the Act of June 6, 1900, 31 Stat. 321, 330, in the area, if any, which on that date was so used or occupied by it?" (R. 7.)

Introductory.

The several possible sources from which there might have been derived so-called "possessory rights" of a kind subject to such a taking as here sued upon were quite formally enumerated by Congress in the very legislation under the authority of which the instant Timber Sale Agreement was expressly executed. Act of August 8, 1947 (printed in full at pages 2-3, *supra*).

Section 1 of that Act defined "possessory rights" as meaning

> "all rights, if any should exist, which are based upon aboriginal occupancy or title, or upon section 8 of the Act of May 17, 1884 (23 Stat. 24), section 14 of the Act of March 3, 1891 (26 Stat. 1095), or section 27 of the Act of June 6, 1900 (31 Stat. 321), * * *."

As already developed in Points I and II, full proprietary ownership stems directly from aboriginal occupancy or title, and thus falls squarely within the four corners of that definition. But in addition the possibility of at least two other approaches has been suggested. One would be by way of what by 1947 had become so well known as "original Indian title", which in turn also derives from aboriginal occupancy or title but the potentialities of which have been so misconstrued by the court below, all as more fully developed elsewhere in this brief (see pages 57 to 62, *infra*). The other would be by way of whatever new forms of statutory rights had been created by the Act of May 17, 1884, or the subsequent cited Acts. This latter approach will now be more fully explored under this Point. If petitioner qualifies under the terms of either act that legislation would clearly and independently establish full proprietary ownership of the entire area.

Text of the Acts.

As already set forth at R. 23, section 8 of the Act of May 17, 1884, entitled "An Act providing a civil government for Alaska," 23 Stat. 24, 26, provided

> "That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress."

Section 14 of the Act of March 3, 1891, entitled "An Act to repeal timber-culture laws * * *," 26 Stat. 1095, 1101, is of little import in the present connection for it did not even purport to create any new rights.

But the third of the cited statutes is on the contrary along lines similar to the first one. Section 27 of the Act of June 6, 1900, entitled "An Act making further provision for a civil government for Alaska * * *," 31 Stat. 321, 330, reenacted as of that date the principal terms of the earlier Act in an even more simple form that

> "The Indians * * * shall not be disturbed in the possession of any land **now** actually in their use or occupation,"

Construction and application.

Although determination of whether any of these statutory conditions of use or occupation or claiming in 1884, or of use or occupation sixteen years later in 1900, were satisfied by petitioner is reserved for further proceedings under Rule 38(b) of the court below, a prima facie case has already been established at Tr. 18-34, 41-46, 87-90. But the question immediately before this Court is only the legal one as to what rights, if any, would have inured to petitioner if it is found to have satisfied any of those conditions. Issues 3 and 4 as stated at R. 7.

Neither statute is ambiguous or difficult to construe or apply. Together they run almost the entire gamut of terms ordinarily used with respect to real property—"possession," "use," "occupation," "claimed," "title." The reference to further legislation is omitted in 1900, and was just as needless in 1884. For in both "possession" is

the key word. For it is "possession"—irrespective of whether of aboriginal origin or more currently acquired under the other conditions of the statute itself—which is the true subject of both. It is "possession" by the Indians which is not to be disturbed. And that term when so used in an Act of Congress is indeed a word of art. It had already been judicially construed by this Court, and must be presumed to have been used by Congress in the sense in which it had been so construed. *United States* v. *Arredondo*, 6 Pet. 691, 743; *Kepner* v. *United States*, 195 U. S. 100, 124.

The *Arredondo* case arose under the Treaty of 1819 whereby we acquired Florida from Spain. The inviolability of property rights in ceded territory which has just been considered under Point II was assumed as a matter of course. But the question was presented as to whether the words "in possession of the lands", in the 8th article of the Treaty required actual occupancy. In ruling in the negative this Court emphasized that "possession" and "occupation" are not synonymous, but on the contrary are distinct legal concepts,* and that use of the former in legal parlance necessarily implies full and complete ownership—

> "The law deems every man to be in the legal seisin and possession of land to which he has a perfect and complete title; this seisin and possession is coextensive with his right, and continues until he is ousted therefrom by an actual adverse possession. This is a settled principle of the common law, recognized and adopted by this court in [five cases cited], and is not now to be questioned.
>
> "This gives to the words 'in possession of lands' their well settled and fixed meaning: **possession does not imply occupation or residence; had it been so in-**

* It is interesting to note that in a recent original Indian title case this Court definitely recognized this identically same distinction obtaining with respect to aboriginal Indian law: "Occupancy necessary to establish aboriginal possession is a question of fact to be determined as any other question of fact." *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 345.

> tended, we might presume they would have been used. By adopting words of known legal import the grantors must be presumed to have used them in that sense, and to have so intended them; to depart from this rule would be to overturn established principles."

In the *Kepner* case this Court reiterated with special reference to legislation by Congress that—

> "It is a well settled rule of construction that language used in a statute which has a settled and well known meaning, sanctioned by judicial decision, is presumed to be used in that sense by the legislative body. The Abbotsford, 98 U. S. 440."

To the same inevitable effect are the dictionary definitions. We refer the Court to such pertinent excerpts from those definitions (Funk & Wagnalls New Standard Dictionary) as—

> "possess * * * 1. To have the **ownership** with the control and enjoyment of; have as a property or attribute; **own**; as, to *possess* a house, a family, or a conscience. * * *"

> "possession * * * 4. Law. (1) The exercise of such a power over a thing as attaches to lawful **ownership**; the detention or enjoyment of a thing by a man himself, or by another in his name; the condition under which one may exercise power over a thing at pleasure, to the exclusion of all others; especially, the exercise of exclusive dominion over land. * * *"

> "dominion * * * 2. The right of absolute possession and use; **ownership**; power of disposal."

Webster is to substantially the same effect.

The opinion below.

That opinion avoided any serious consideration of this branch of the case by the simple device of quoting in full the relatively longer Act of August 8, 1947, and then easing into a comment devoted primarily to the latter. R. 22-25.

It conspicuously ignored any mention of either *Arredondo* or *Kepner*, both of which had been briefed and quoted to the court below to exactly the same length as in this Point.

Preview of evidence.

Presentation of evidence as to the details of use and occupation and claiming in 1884 and 1900 is, of course, reserved for further proceedings which we hope will be required by remand of this case. But a brief preview of some of the official documentary evidence which we look forward to offering at that stage should also prove enlightening in the present connection. Unfortunately the Censuses of 1880 and 1900 are very incomplete and fragmentary with respect to Alaska and especially so with respect to its Indians. But surprising as it may seem the Census of 1890 which falls right in between our two critical dates abounds with helpful detail. In particular it specifies not only petitioner's permanent village at Wrangell (population 316) and also deals separately with three of the key spots in the clan's Prince of Wales Island area: Lake Bay (population 31, of whom 28 were Indians, number of houses 12); Salmon Bay (population 42 of whom 41 were Indians, number of houses 16); and Red Bay (6 buildings but no one there at the time of the enumeration). The Report specifically referred to the fact that all three of those key fishing spots were completely vacated during the winter.* (United States, 11th Census, 1890, Vol. 8, pages 29, 163; Bulletin No. 30, pages 5, 27.)

Summary.

Thus by this entirely different approach, and quite irrespective of aboriginal rights, the conclusion is independently required that, if petitioner is found to have either

* The enumeration made at least in part during the fishing season apparently recorded each Indian where it found him at the time in accordance with the customary cycle of Tlingit economy as already described at page 11, *supra*.

in 1884 or 1900 satisfied any one of the statutory conditions, the substantial possessory rights of undisturbed possession which thereby inured to it were to all intents and purposes legally equivalent to full proprietary ownership. Practically all *Tlingit* Indian occupancy or use in either of those years stemmed from aboriginal ownership of the same respective areas, so that the practical effect of these two Acts was recognition and confirmation of that ownership.

IV. Petitioner's admittedly less intensive user of its area since the turn of the century does not constitute prima facie evidence of extinguishment or termination of its interest therein, whatever may have been the nature or extent of that interest.

Issue 5.

Point IV deals with a question of common interest in connection with all three preceding Points as originally posed in issue 5—

> "5. In the event a decision of an affirmative nature on any of issues 2, 3, or 4, is followed by evidence indicating specific property rights on the part of plaintiff at any of those times, then would the testimony of plaintiff's witness Paul as to recent less intensive use of the areas claimed by plaintiff (Tr. 13-14, 29-30, 44-45, 96-97) constitute prima facie evidence of termination or loss of such rights?" (R. 7.)

The facts.

Admittedly, petitioner's use of its ancestral Tee-hit-ton area has been less intensive since the turn of the century. The evidence referred to in issue 5 was in large part voluntarily introduced by it in its desire to facilitate prompt disposition of all issues that may lurk in the case.

That evidence is summarized in paragraph 17 of the findings of fact at R. 30-31—

"17. Small pox, hard liquor, and loose living decreased both the number of Tee-hit-ton and the authority of local clan officials over individuals. At about the turn of the century the clan had only one woman of child-bearing age. Since that time the clan has had 65 or fewer people. Because of this population decrease, and changes in the economic patterns brought about by such things as the use of powerboats for fishing, * * * the Tee-hit-ton * * * are and have been physically incapable of controlling or exploiting the area which was once the sole support of a larger number of people, particularly when significant amounts of time must be spent gaining a livelihood today under conditions which preclude extensive use either of small fishing streams or hunting areas."

The Court may care to read the original pages of the evidence at Tr. 13-14, 29-30, 44-45, 96-97, but for present purposes the summarized finding just quoted serves reasonably well.

The law bearing on ordinary title.

It is familiar law that title to real property can not be divested through mere inaction or indifference or even by abandonment. 73 C.J.S. 208-209; Thompson on Real Property, Vol. 5, Secs. 2565-2567; Tiederman on Real Property, Sec. 516; Tiffany on Real Property, 3rd Ed., Vol. 4, Sec. 965. To quote briefly a salient excerpt:

"In order to justify the conclusion that there has been an abandonment of property there must be some clear and unmistakable affirmative act indicating a purpose to repudiate the ownership thereof. It must be remembered that the intent to relinquish ownership is a material element in abandonment. In fact it is said to be the determining element on the issue of abandonment, * * *. Mere non-user, or neglect to assert rights in a vested estate does not result in the loss of ownership thereof in the absence of adverse possession * * *." (Thompson, Sec. 2566)

Or to sum it all up in a sentence:

> "Failure to assert a valid title does not operate to extinguish it." (Tiffany Sec. 965)

As this Court stated it in *United States* v. *Arredondo*, 6 Pet. 691, 743, legal possession

> "continues until he is ousted therefrom by an actual adverse possession."

A fortiori petitioner's possession and title could not have been divested when as here any inaction was merely the natural and inevitable result of changing economic conditions. And the finding here under consideration could not possibly constitute a prima facie case against petitioner, as it includes neither of the essential factors of intent or adverse possession.

The law bearing on "original Indian title".

As already developed in Point I and further considered hereinafter in Point VI petitioner cannot acquiesce in the decision below that its interest in its ancestral area ever degenerated to the low estate of so-called "original Indian title". But in the interests of a complete presentation of all possible aspects of this case it should be noted that this Court has definitely held that the same principles which have just been considered are equally applicable to that lesser degree of title. *United States* v. *Santa Fe Pacific Railroad Co.*, 314 U. S. 339, 354, 356, 357-358, frequently referred to as the *Walapai* case.

It is scarcely necessary to burden this brief with a detailed statement of the rather involved facts of that case which involved two different classifications of land, as to only one of which was the Indian claim sustained. The important thing at this point is that the same test of *intent* was applied to both aspects of the case—

> "Nor was there any plain intent or agreement on the part of the Walapais to abandon their ancestral lands * * *.

"Certainly a forced abandonment of their ancestral lands was not a 'voluntary cession' * * *

"A few of them thereafter lived on the reservation; many of them did not. While suggestions recurred for the creation of a new and different reservation, this one was not abandoned. For a long time it remained unsurveyed. Cattlemen used it for grazing, and for some years the Walapais received little benefit from it. But in view of all the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation and that that relinquishment was tantamount to an extinguishment by 'voluntary cession' within the meaning of § 2 of the Act of July 27, 1866."

To the same effect is a very apt summary of the law in an earlier opinion of the court below—and incidentally it may have been noted that this is our first citation of a case other than a decision of this Court and that up to this point all citations have been to its decisions. We quote from *Fort Berthold Indians* v. *United States*, 71 C. Cls. 308, 334—

"Beyond doubt, abandonment of claimed Indian territory by the Indians will extinguish Indian title. In this case the Government interposes the defense of abandonment, asserting that the facts sustain the contention. It is of course conceded that the issue of abandonment is one of intention to relinquish, surrender, and unreservedly give up all claims to title to the lands described in the treaty, and the source from which to arrive at such an intention is the facts and circumstances of the transaction involved. Forcible ejection from the premises, or **nonuser under certain circumstances, as well as lapse of time, are not standing alone sufficient to warrant an abandonment.** *Welsh* v. *Taylor*, 18 L. R. A. 535; *Gassert* v. *Noyes*, 44 Pacific 959; *Mitchell* v. *Corder*, 24 W. Va. 277."

Summary.

It follows therefore that irrespective of whether petitioner's property rights are established under Point I or under Point III, or even if it could be held to have nothing more than original Indian title, paragraph 5 of the issues which were on trial in this case should have been answered in the negative; the petitioner is as yet under no burden of going forward with evidence on this aspect of the case; and the court below erred in failing to so hold.

V. The appropriation of timber rights implicit in the execution of the timber sale agreement by respondent's agents on August 20, 1951, constituted as of that date a partial and compensable taking of any title or possessory rights that petitioner may establish.

Issue 6.

This Point deals with original issue 6, which was in turn occasioned by paragraphs 13 and 14 of respondent's Third Defense in its Answer at R. 5 where it pleaded that this suit was premature because no timber had yet been cut. Issue 6 posed the following question—

> "6. If any such property rights are established, and had not meanwhile been terminated or lost, then would the execution of the Timber Sale Agreement of August 20, 1951, (as admitted in paragraph 10 of defendant's Answer) constitute a compensable taking of such rights, or would it give rise to a right to an accounting within the jurisdiction of this Court, or both?"* (R. 7.)

The facts.

This case involves what might be characterized as a horizontal rather than a vertical taking. No one section

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* The second alternative has not yet been briefed or argued below and accordingly is not further discussed at this time. See the Second Count of our original Petition at R. 3.

of the timber sale area was taken outright, but the cream, i.e., the timber, was skimmed off the entire area. Even under our view of the case, petitioner admittedly would still have the use—and the unimpaired legal ownership—of the bare land itself, stripped however of its most valuable resource.*

The full text of the Timber Sale Agreement is in the record as Plaintiff's Exhibit 4 and is incorporated by reference in paragraph 21 of the findings of fact at R. 31. In a word, the respondent acting under the express authority of the Act of August 8, 1947 (page 2, *supra*), agreed to sell to a pulp and paper company over a period extending to 2004 all the merchantable timber, estimated at 1,500,000,000 cubic feet, on an area which included part of the area claimed by plaintiff as its ancestral property.

Partial taking.

Such a forced division of the total proprietary right with strangers is a partial taking which in turn is just as compensable and actionable as a complete taking. *Shoshone Tribe* v. *United States*, 299 U. S. 476, 497; *United States* v. *Peewee Coal Co.*, 341 U. S. 114, 117-118, 119, and cases there cited; *Gerlach Live Stock Co.* v. *United States*, 102 C. Cls. 392, 395.

In the *Shoshone* case the overall size of the reservation had not been reduced but the tribe had been forced to share it with other Indians. In a decision for the Indians this Court stated the law most succinctly that—

> "The fact is unimportant that it was a partial taking only, and that eviction was not complete."

The *Peewee* case dealt with a taking which was partial in that it was only temporary.

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* Such timber is not merely valuable on its own account. Its depletion would inevitably spell a corresponding depletion in game and wild life.

The *Gerlach* case while not involving Indian lands nevertheless affords an exceptionally close and pertinent parallel. There as here the plaintiff's ownership of the land had not been impaired. The building of a dam up stream had, however, effected a taking of one of its natural resources; viz., natural irrigation through seasonal overflow of the river below the dam site. In overruling defendant's demurrer the Court of Claims held—

> "Certainly [the Government] has not the right to take the water away from one man and sell it to another without compensating the man deprived of it. Plaintiff's riparian rights in this stream, if any, was a property right, of which it cannot be deprived without being paid just compensation.
>
> "However, defendant says the plaintiff's land has not been taken, but has only been damaged by the destruction of its riparian rights, and that this court has jurisdiction only of a suit for a taking of land and not for damages to it. We do not think this is a suit for damages to land; it is one for the taking of a right plaintiff had to use the water of this river. This is a property right, for the taking of which the owner is entitled to just compensation. Yates v. Milwaukee, 10 Wallace 497, 504."

So here, if petitioner had any property right in the land itself, as it unquestionably did, then—and wholly irrespective of the nature of that right—its corresponding rights in the timber growing thereon constitute a similar property right of which it cannot be thus deprived without being paid just compensation.

Petitioner's compensable interest in the timber.

If plaintiff's full proprietary ownership of its portion of the timber sale area is sustained in accordance with the preceding Points of this brief and with the evidence that may be adduced in a further proceeding, then there obviously can be no question as to its correspondingly full interest in the timber growing on that area.

And once again in the interests of complete presentation of all aspects of the case it is to be noted that the same conclusion would necessarily have to be reached even under original Indian title. For such title is an unrestricted right of occupancy, and if the right to use the waters of an adjoining river is property, *a fortiori* the even larger right to use and occupy the land must necessarily be property. But fortunately the precise issue with respect to such ownership of timber has been decided by this Court. *United States* v. *Shoshone Tribe*, 304 U.S. 111, 115-118; *United States* v. *Klamath Indians*, 304 U.S. 119, 123. In the *Shoshone* case the question arose with respect to a tribe which both by original Indian title and by treaty had a similar right to the "use and occupation" of the lands of its reservation. This Court ruled squarely at pages 117-118—

> "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 48. *Worcester* v. *Georgia*, supra, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial. * * *
>
> "The lower court did not err in holding that the right of the Shoshone Tribe included the timber and minerals within the reservation."

To the same effect in the *Klamath* case it was on the same day ruled at page 123—

> "The worth attributable to the timber was a part of the value of the land upon which it was standing. Plaintiffs were entitled to have that element of value included as part of the compensation for the lands taken. United States v. Shoshone Tribe, ante, p. 111."

Accrual of cause of action.

In paragraphs 13 and 14 of its Answer in this case (R. 5) respondent suggests that as it may be many years before there will be any actual cutting in the timber sale area petitioner's cause of action, if any, has not yet accrued. Could anything be more fallacious? The very existence of the Timber Sale Agreement establishes the chief value of the area to have been its stand of marketable timber, and at the same time illustrates and confirms that the customary and ordinarily the only practical means of realizing such values on the part of the initial owner is through just such a sale of the timber rights for a period of years. Whether in entering into that Agreement the respondent was acting in the capacity of an all-wise Government solicitous for the social and economic welfare of Alaska as a whole, or merely in that of a self-assertive claimant to ownership of the soil, is immaterial. The fact remains that it did the conventional thing, and is in no position to even intimate that Indian owners who are no better able than the Government to cut and process commercial timber, and in no more favorable position to realize immediate cash from their holdings, should be relegated to a less practical course. The Indians' right to realize on their values in the accepted and conventional manner of negotiating a comparable agreement was completely taken from them on August 20, 1951, and it necessarily follows that their cause of action for that taking, accrued on that date.

But extensive *a priori* reasoning is scarcely necessary. For again the *Gerlach Live Stock Company* case affords an almost exact parallel, and again the reasoning and decision of the Court of Claims in its final opinion in that case are directly to the point. *Gerlach Live Stock Co.* v. *United States*, 111 C. Cls., 1, 82, 86-87, affirmed at 339 U. S. 725, 755. There as here

> "defendant says that at any rate it has not as yet taken any rights from plaintiff." (page 82.)

After further discussion of the facts and an eventual quotation from *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327, which involved only a question as to whether or not there had been a taking at all and not as to when it had occurred, the Court of Claims continued at page 86—

> "We think the reasoning behind this decision furnishes a guide for the determination of **the time of the taking.** That time, it would seem, **comes whenever the defendant's intent to take has been definitely asserted and it begins to carry out that intent.** So long as it is conjectural whether or not defendant will actually take plaintiff's property, a taking has not occurred, but when conjecture ripens into a definitely asserted purpose and steps are taken to carry out that purpose, the taking may be said to have occurred.
>
> "In the case at bar there can be no doubt that the defendant intended to deprive plaintiffs of whatever water rights they had in their lands. This is evidenced by a number of things. The construction of the dam, which would result in the deprivation of plaintiff's rights, had been begun on November 3, 1939, a considerable time prior to October 20, 1941. In the 23 days following that date a considerable body of water had been impounded in the pool behind the dam, and construction was continuing insofar as materials could be obtained.
>
> "Not only that, but defendant had paid for many of the rights they intended to take. They had entered into an agreement with Miller & Lux to pay them something like two and a half million dollars for the taking of water rights, some of which were appurtenant to lands riparian to this river, including plaintiff's lands. There can be no doubt on the record that defendant's intention to take plaintiff's rights had been clearly demonstrated and that it was in the process of carrying out that intention.
>
> "We have no doubt that a taking had occurred not later than October 20, 1941. **Certainly by that time defendant had brought about a decrease in the value of plaintiffs' lands.** With the imminent prospect of

their being deprived of any further rights to the flood waters of this river, they could not have sold them for their former value.

"We hold that the taking of plaintiff's water rights occurred not later than October 20, 1941."

Here the execution of the Agreement definitely fixed August 20, 1951, as both the date when "the [respondent's] intent to take has been definitely asserted" and the time when "[respondent] had brought about a decrease in the value of [petitioner's] lands."

Indeed the Timber Sale Agreement, drafted and executed as it was by respondent's agents, is itself sufficient answer to respondent's claim on this point. The express provision of section 6 that

> "**Title** to all timber included in this agreement shall **remain in the United States** until it has been paid for, felled and scaled or measured."

completely refutes any argument by respondent that it will not have taken title to petitioner's timber until it is cut—in some instances perhaps a generation or more hence.

VI. Even if its decision that "original Indian title" obtained in Alaska could be sustained, the court below erred as to the consequences which it attributed to that premise.

The court below held (1) that petitioner's interest had under Russian sovereignty been reduced to original Indian title and (2) that even if such an interest survived the treaty of 1867 it still "would not be a right on which a suit against the United States could be based". Petitioner again submits that on the contrary the only proper and sound disposition of this case is along the lines developed in the preceding pages, and this Point is a sort of anomaly in even referring to any other possibility. Let us make our position crystal clear that we do so only in deference to the proprieties which may call for at least some comment

on what seems to be such an essential part of the rationale of the opinion of the court below. And we do so without in the least qualifying our prime reliance upon our preceding Points which together lead to a result wholly inconsistent with the conclusion below and by the same token completely refute it.

But to get back to the opinion below, we have already shown how it made the wrong turn when at the very first fork it took off so blithely down the wrong road of original Indian title. But this Court should also be apprised—even if only briefly—as to how far and how frequently it wandered still further off even that wrong road.

Effect of the treaty of cession.

First a word as to the effect of the cession of 1867. Even original Indian title would have survived the treaty of 1867. Indeed such a result as to this particular form of property is a necessary implication of a long line of decisions of this Court from *Soulard* v. *United States*, 4 Pet. 511, 512-513 (see quotation therefrom at page 31, *supra*) right on down to the recent and unanimous opinion in *United States* v. *Santa Fe Pacific Railroad Company*, 314 U. S. 339. In the latter case it is specifically so ruled at page 345 as to the Mexican cession, as still further explained in terms of general application at page 346—

> "* * * Perhaps the assumption that aboriginal possession would be respected in the Mexican Cession was, like the generalizations in *Johnson* v. *McIntosh*, *supra*, not necessary for the narrow holding of the case. But such generalizations have been so often and so long repeated as respects land **under the prior sovereignty of the various European nations**, including Spain, that, like other rules governing titles to property (United States v. Title Insurance & Trust Co., 265 U. S. 472-486-487) they should now be considered no longer open."

And irrespective of whether such title was "recognized" or "unrecognized" under the classification which has been sought to be developed in some of the opinions in this field, its taking under the circumstances of this case would be compensable.

Recognized original Indian title.

If petitioner's title had been "recognized" there is no question that as a matter of law it would be compensable. The opinion below so concedes at the top of R. 20. Cf. the *Tillamooks* case, 329 U. S. 40, 49, 57, and cases there cited. But then, having injected this new factor into the case, the opinion below stops short without directing any attention to the application of that principle even though the record here, and particularly the Acts of 1884 and 1900 (already fully set forth in Point III at pages 41-47, *supra*), furnish even stronger grounds for a holding of sufficient recognition than the 1848 Act upon which this very same court below had relied in its own opinion in the *Tillamooks* case. See 329 U. S. 40, 54, and 103 C. Cls. 494, 554. Indeed those Acts of 1884 and 1900 did the very thing referred to in the dissenting opinion in *Tillamooks* as necessary; they gave this petitioner its own area "as a place upon which to live". 329 U. S. 40, 57. And in the present instance the argument for "recognition", if any such an argument is necessary, is still further strengthened by the impounding provisions of the Act of August 8, 1947, quoted in full at page 3, *supra*, as well as in the opinion below at R. 23-24. Nor can the fact of the Government's own argument in its brief in *United States* v. *Libby, McNeill & Libby*, 107 F. Supp. 697 (1952), that

> "All Congressional enactments concerning Alaskan Natives recognized their aboriginal rights. * * * The Miller case to the contrary notwithstanding"

be undone by any subsequent repudiation by an Acting Assistant Attorney General for expressed reasons of expediency!

Unrecognized original Indian title.

If, despite all the argument of the preceding pages, this alleged aspect of this case is nevertheless reached, we submit that any such distinction as suggested by the opinion below is wholly illusory. *Shoshone* case 299 U. S. 476; 304 U. S. 92, 115, 117; *Tillamooks* case, 329 U. S. 40. Bearing in mind that "original Indian title" and "Indian right of occupancy" are commonly used as synonymous terms and were actually so used in the opinion below (R. 19), and that in *Shoshone* the original Indian title had even been "recognized" by treaty, the following excerpts from the last opinion in that case make it clear that this Court's decision was based on that right quite irrespective of whether it had or had not been recognized—

> "In this case we have held, 299 U. S. 476, 484, that the tribe had the right of occupancy with all its beneficial incidents; that, the right of occupancy being the primary one and as sacred as the fee, division by the United States of the Shoshones' right with the Arapahoes was an appropriation of the land *pro tanto;* that although the United States always had legal title to the land and power to control and manage the affairs of the Indians, it did not have power to give to others or to appropriate to its own use any part of the land without rendering, or assuming the obligation to pay, just compensation to the tribe, for that would be, not the exercise of guardianship or management, but confiscation.
>
> * * * "
>
> "Although the United States retained the fee, and the tribe's right of occupancy was incapable of alienation or of being held otherwise than in common, that right is as sacred and as securely safeguarded as is fee simple absolute title. *Cherokee Nation* v. *Georgia*, 5 Pet. 1, 48. *Worcester* v. *Georgia*, supra, 580. Subject to the conditions imposed by the treaty, the Shoshone Tribe had the right that has always been understood to belong to Indians, undisturbed possessors of the soil from time immemorial. * * * "

Even more emphatic to that effect is the principal opinion in the *Tillamooks* case, 329 U. S. 40, where four of the prevailing majority joined in ruling at pages 51-52—

> "Nor do other cases in this Court lend substance to the dichotomy of 'recognized' and 'unrecognized' Indian title which petitioner urges. Many cases recite the paramount power of Congress to extinguish the Indian right of occupancy by methods the justice of which "is not open to inquiry in the courts' ". *United States* v. *Santa Fe Pacific R. Co.*, supra, at 347. Lacking a jurisdictional act permitting judicial inquiry, such language cannot be questioned where Indians are seeking payment for appropriated lands; but here in the 1935 statute Congress has authorized decision by the courts upon claims arising out of original Indian title. Furthermore, some cases speak of the unlimited power of Congress to deal with those Indian lands which are held by what petitioner would call 'recognized' title; yet it cannot be doubted that, given the consent of the United States to be sued, recovery may be had for an involuntary, uncompensated taking of 'recognized' title. 'Whether this tract . . . was properly called a reservation . . . or unceded Indian country, . . . is a matter of little moment . . . the Indians' right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon."

We are not unmindful that the opinion below at R. 19 held that this considered opinion of four Justices of this Court had been overruled by what it concedes to be mere dictum in a later case which did not even deal with the compensability of Indian title and in which the reference to that subject was neither occasioned nor required by anything in the record or the briefs. We submit, however, that the court below went far beyond the bounds of its proper judicial function in its *ipse dixit* attributing such effect to mere dictum—and especially in dictum buried as this was in a long footnote which in turn related primarily to a still different subject. See 337 U. S. 106. In any event

we suggest that an issue of such vital importance in at least 400 other pending causes of action by Indians in continental United States (the Government gives that figure at page 9 of its Memorandum in answer to our Petition for Certiorari at October Term, 1953, No. 696) should not be disposed of in such cavalier fashion. We do not burden this brief with lengthy argument on a point which in our judgment will never be reached. But if perchance it is reached it might well be that an opportunity to brief and argue a question of such wide importance could be granted.

CONCLUSION

Going back to issues 2-6 which are posed at R. 7, and which present the basic controversy submitted to this Court, petitioner submits that the judgment below should be reversed and the case remanded with directions

> to answer issues 2, 3, and 4 to the effect that after the inception of American sovereignty petitioner's right in any area which it had up to then used or occupied in its accustomed Indian manner was one of full proprietary ownership, and that on May 17, 1884, or June 6, 1900, its right in any area so used or occupied on either of those dates (or claimed in 1884) was similarly one of full proprietary ownership;

to answer issue 5 in the negative; and

to answer the first alternative of issue 6 in the affirmative.

Respectfully submitted,

JAMES CRAIG PEACOCK,
Counsel for Petitioner,
817 Munsey Building,
Washington 4, D. C.

MARTIN W. MEYER,
WILLIAM L. PAUL, JR.,
FREDERICK PAUL,
JOHN E. SKILLING,
JOHN H. MYERS,
Of Counsel.

August 1954.

APPENDIX

Treaty With Russia

(15 Stat. 539)

Treaty concerning the Cession of the Russian Possessions in North America by his Majesty the Emperor of all the Russias to the United States of America; Concluded March 30, 1867; Ratified by the United States May 28, 1867; Exchanged June 20, 1867; Proclaimed by the United States June 20, 1867.

Article 1.

His Majesty the Emperor of all the Russias agrees to cede to the United States, by this convention, immediately upon the exchange of the ratifications thereof, all the territory and dominion now possessed by his said Majesty on the continent of America and in the adjacent islands, the same being contained within the geographical limits herein set forth, to wit: The eastern limit is the line of demarcation between the Russian and the British possessions in North America, as established by the convention between Russia and Great Britain, of February 28-16, 1825, and described in Articles III and IV of said convention, in the following terms:

"Commencing from the southernmost point of the island called Prince of Wales Island, which point lies in the parallel of 54 degrees 40 minutes north latitude, and between the 131st and the 133d degree of west longitude, (meridian of Greenwich,) the said line shall ascend to the north along the channel called Portland channel, as far as the point of the continent where it strikes the 56th degree of north latitude; from this last-mentioned point, the line of demarcation shall follow the summit of the mountains situated parallel to the coast as far as the point of intersection of the 141st degree of west longitude, (of the same meridian;) and finally, from the said point of intersection, the said meridian line of the 141st degree, in its prolongation as far as the Frozen ocean.

"IV. With reference to the line of demarcation laid down in the preceding article, it is understood—

"1st. That the island called Prince of Wales Island shall belong wholly to Russia," (now, by this cession, to the United States.)

"2d. That whenever the summit of the mountains which extend in a direction parallel to the coast from the 56th degree of north latitude to the point of intersection of the 141st degree of west longitude shall prove to be at the distance of more than ten marine leagues from the ocean, the limit between the British possessions and the line of coast which is to belong to Russia as above mentioned (that is to say, the limit to the possessions ceded by this convention) shall be formed by a line parallel to the winding of the coast, and which shall never exceed the distance of ten marine leagues therefrom."

The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring's straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen ocean. The same western limit, beginning at the same initial point, proceeds thence in a course nearly southwest through Behring's straits and Behring's sea, so as to pass midway between the northwest point of the island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; then, from the intersection of that meridian, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian.

ARTICLE II.

In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. It is, however, understood and agreed, that the churches which have been built

in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory, as may choose to worship therein. Any government archives, papers and documents relative to the territory and dominion aforesaid, which may be now existing there, will be left in the possession of the agent of the United States; but an authenticated copy of such of them as may be required, will be, at all times, given by the United States to the Russian government, or to such Russian officers or subjects as they may apply for.

ARTICLE III

The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

ARTICLE IV

His Majesty the Emperor of all the Russias shall appoint, with convenient despatch, an agent or agents for the purpose of formally delivering to a similar agent or agents appointed on behalf of the United States, the territory, dominion, property, dependencies and appurtenances which are ceded as above, and for doing any other act which may be necessary in regard thereto. But the cession, with the right of immediate possession, is nevertheless to be deemed complete and absolute on the exchange of ratifications, without waiting for such formal delivery.

ARTICLE V.

Immediately after the exchange of the ratifications of this convention, any fortifications or military posts which may be in the ceded territory shall be delivered to the agent of the United States, and any Russian troops which may

be in the territory shall be withdrawn as soon as may be reasonably and conveniently practicable.

ARTICLE VI.

In consideration of the cession aforesaid, the United States agree to pay at the treasury in Washington, within ten months after the exchange of the ratifications of this convention, to the diplomatic representative or other agent of his Majesty the Emperor of all the Russias, duly authorized to receive the same, seven million two hundred thousand dollars in gold. The cession of territory and dominion herein made is hereby declared to be free and unencumbered by any reservations, privileges, franchises, grants, or possessions, by any associated companies, whether corporate or incorporate, Russian or any other, or by any parties, except merely private individual property holders; and the cession hereby made, conveys all the rights, franchises, and privileges now belonging to Russia in the said territory or dominion, and appurtenances thereto.

ARTICLE VII.

When this convention shall have been duly ratified by the President of the United States, by and with the advice and consent of the Senate, on the one part, and on the other by his Majesty the Emperor of all the Russias, the ratifications shall be exchanged at Washington within three months from the date hereof, or sooner, if possible.

In faith whereof, the respective plenipotentiaries have signed this convention, and thereto affixed the seals of their arms.

Done at Washington, the thirtieth day of March, in the year of our Lord one thousand eight hundred and sixty-seven.

(L.S.) William H. Seward
(L.S.) Edouard De Stoeckl.